82-293

No. 81-

Office - Supreme Court, U.S.
FILED
AUG 18 1982
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1981

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

PETER D. STERGIOS

SHEA & GOULD
Counsel for Appellants
330 Madison Avenue
New York, New York 10017

Questions Presented

1. Whether Executive Law Section 296.10 is violative of the Establishment Clause of the First Amendment of the Constitution of the United States because it impermissibly entangles government with religion, does not reflect a clearly secular legislative purpose, and has a primary effect of advancing religion.

2. Whether Executive Law Section 296.10 is violative of the Establishment Clause of the First Amendment of the Constitution of the United States when applied to require a hospital to alter uniformly applied terms and conditions of employment, vary facially, non-discriminatory scheduling of shifts or coerce other employees to accommodate the purported religious beliefs of a Seventh Day Adventist Sabbath observer.

3. Whether Executive Law Section 296.10 is violative of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and should be void by reason of its vagueness.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes	3
Raising the Federal Question	5
Statement of the Case	6
The Questions Are Substantial	14
Conclusion	22
Appendix	
Decision of Court of Appeals Denying Leave to Appeal to the Court of Appeals	1a
Decision of Appellate Division, Second Department, Denying Leave to Appeal to the Court of Appeals	2a
Order of Appellate Division, Second Department, Adhering to Original Determination After Re-argument	3a
Order of Affirmance of Appellate Division	4a
Opinion of Appellate Division	6a

PAGE

Order of State Human Rights Appeal Board 8a

Notice of Order After Hearing of the Commissioner of the State Division of Human Rights 11a

Proceedings 14a

Notice of Appeal to the Supreme Court of the United States 22a

Affidavit of Mailing 24a

TABLE OF AUTHORITIES

Cases

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 15

Big Mama Rag, Inc. v. *U.S.*, 631 F.2d 1030 (D.C. Cir. 1980) 19

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) ... 15

Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973) 15, 18

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) 17

Gavin v. *Peoples Natural Gas Company*, 613 F.2d 482 (3d Cir. 1980) 18, 19, 20

Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976) .. 20

Isaac v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980) 18

Minkus v. *Metropolitan Sanitary District*, 600 F.2d 80 (7th Cir. 1979) 16

PAGE

State Division of Human Rights v. *Genesee Hospital*, 68 A.D.2d 692, *rev'd sub nom. Matter of Genesee Hosp.* v. *State Div. of Human Rights*, 50 N.Y.2d 917 (1980) 15

Trans World Airlines v. *Hardison*, 432 U.S. 63 (1977) 14, 17

Statutes

Title VII of the Civil Rights Act of 1964, Sections 701(j) and 703(a)(1), 42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1) 3, 14, 18

N.Y. Executive Law § 296.10 ....4, 6, 13, 14, 16, 17, 18, 19, 20, 21

Supreme Court of the United States

October Term, 1981

No.

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

The decision of the Court of Appeals of New York, which appears in the appendix hereto, p. 1a, *infra*, is reported at —— N.Y.2d —— (1982).

The decision of the Appellate Division, Second Department, denying appellants permission to appeal to the Court of Appeals, which appears in the appendix hereto, p. 2a, *infra*, is reported at —— A.D.2d —— (2d Dept. 1982).

The decision of the Appellate Division, Second Department, adhering to its original determination, after reargument by appellants, which appears in the appendix hereto,

p. 3a, *infra*, is reported at —— A.D.2d —— (2d Dept. 1981).

The decision of the Appellate Division, Second Department, affirming the determination of the State Human Rights Appeal Board, which appears in the appendix hereto, p. 4a, *infra*, is reported at 82 A.D.2d 799 (2d Dept. 1981).

The determination of the State Human Rights Appeal Board, affirming the Decision and Order of the Commissioner of the State Division of Human Rights, dated November 24, 1980, is not reported. It is reprinted in the appendix hereto, p. 8a, *infra*.

The Decision and Order of the Commissioner of the State Division of Human Rights, dated July 17, 1979, is not reported. It is reprinted in the appendix hereto, p. 11a, *infra*.

Jurisdiction

North Shore University Hospital and Florence Fincke, the appellants, appeal from the final determination of the Court of Appeals of New York, dated May 20, 1982, denying appellants permission to appeal to said Court, thereby upholding the constitutionality of New York Executive Law § 296.10 on its face and as applied in this case.

The decision of the Court of Appeals of New York, denying appellants' motion for leave to appeal, was entered on May 20, 1982.

A notice of appeal to this Court was duly filed in the Court of Appeals of New York and the Appellate Division of the Supreme Court, Second Department, on August 17, 1982. *See* appendix, p. 22a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of permission to appeal below. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional Provisions and Statutes

1) First Amendment, United States Constitution:

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2) Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property without due process of law.

3) Fourteenth Amendment, United States Constitution:

No state shall make or enforce any law which . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

4) Title VII of the Civil Rights Act of 1964, Section 701(j) (42 U.S.C. § 2000e(j)):

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

5) Title VII of the Civil Rights Act of 1964, Section 703(a)(1) (42 U.S.C. § 2000e-2(a)(1)):

> (a) it shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

6) New York Executive Law Section 296.10:

> 10. (a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any persons in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.
>
> (b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such persons as leave taken without pay.
>
> (c) This subdivision shall not be construed to apply to any position dealing with health or safety where the person holding such position must be available for duty whenever needed, or to any position or class of positions the nature and quality of the duties of which are such that the personal presence of the holder of such position is regularly essential on any particular day or days or portion thereof for the normal performance of such duties

with respect to any applicant therefor or holder thereof who, as a requirement of his religion, observes such day or days or portion thereof as his sabbath or other holy day. In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claiming to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

* * * *

Raising the Federal Question

Early in the administrative proceedings below, appellants raised the claim, in their brief to the State Human Rights Ap-

peal Board, that Executive Law Section 296.10 was unconstitutional because of its repugnancy to the Establishment and Due Process provisions of the United States Constitution. Although specifically mandated by statute (Executive Law Section 297a.7(a)) to review, *inter alia*, whether the order of the State Division of Human Rights is "in conformity with the constitution and laws of the state and the United States," and although appellants raised the repugnancy claims, the State Human Rights Appeal Board's Order (appendix p. 9a, *infra*) did not address the issue.

The constitutional claims were pressed by appellants before the Appellate Division of the Supreme Court of the State of New York, Second Department. Said court found appellants' constitutional claims to be "without merit" (appendix, p. 7a, *infra*).

After being denied permission to appeal to the New York Court of Appeals by the Appellate Division of the New York Supreme Court, appellants sought leave of the Court of Appeals for permission to appeal. In its motion papers and brief to said Court, appellants once again raised their constitutional claims. By denying appellants' motion for leave to appeal, the Court of Appeals rejected the federal constitutional claims and thereby denied appellants any further New York forum in which to litigate these substantial questions.

Statement of the Case

Appellant, North Shore University Hospital (herein, the "Hospital"), is and was at all relevant times, a voluntary, non-profit hospital with facilities at Manhasset, Long Island, New York. Appellant Florence Fincke (herein, "Fincke"), at the time of appellee Essie Morris' discharge from employment at North Shore, was Assistant Director of Nursing in its Maternal and Child Care Service.

In September of 1976, appellee Essie Morris (herein, "Morris") filed the charge over which appellee, State Division of Human Rights, asserted jurisdiction. The complaint alleged that appellants discriminated against her because of her religion as follows:

> 1. I have been an employee of the respondent for 9 years.
>
> 2. I am a Seventh Day Adventist and my sabbath is Friday after sundown to Saturday sundown. I have had no problems all these years re observance.
>
> 3. On August 30, 1976, I was advised that if I continue to take that time off I would be dismissed.
>
> 4. I believe this to be in violation of the law of this State.
>
> 5. I am a Seventh Day Adventist. Based on the above, I charge North Shore University Hospital; Florence A. [Fincke], Supervisor, with an unlawful discriminatory act by refusing to give me time off for my religious observance because of my creed, in violation of the Human Rights Law of the State of New York.

The facts that led to this charge, may be summarized as follows:

> (1) Morris began employment at North Shore on August 13, 1967. She had joined the Seventh Day Adventist Church in or about June or July of either 1964 or 1965.
>
> (2) Morris worked as a nurse's aide, also called nurse assistant, assigned to infant care.
>
> (3) The Hospital operates two kinds of nurseries for newborn babies: regular nurseries and the premature

special care unit. While Morris normally performed her duties in the regular nurseries, she occasionally worked in the premature special care unit.

(4) The nurseries, as well as the obstetrics department, the delivery room and gynecology, are administered by the Maternal and Child Care Service ("Service") of which appellant Fincke became Assistant Director of Nursing. They function around the clock, three shifts per day, seven days a week. The shifts, called the day, evening and night shifts, are 8 a.m. to 4 p.m., 4 p.m. to 12 midnight, and 12 midnight to 8 a.m.

(5) Each of the nurseries is staffed with four to five personnel, including one nurse's aide per nursery, at any one time depending on the number or "census" of babies. Staffing needs are determined by the average number of nursery care hours appropriate for proper care of an infant, and the daily baby census. The anticipated staffing requirement for any 24 hour period is calculated by multiplying the census times the nursery care hours per infant, divided by the 7½ hours worked by each person per day. The total is then divided again by three, since there are three shifts, to find the number of personnel needed per shift. The requisite number of patient care hours complies with the standards of nursing practice established by the profession and the joint commission of hospitals.

(6) The schedules for nursing personnel in the nurseries are made out and posted in advance. Job openings or shift vacancies are filled on a departmental seniority basis, taking into account the applicant's qualifications. Once an opening is filled, the employee

may remain in it without being bumped out. Requests by nurse's aides or assistants for a particular shift are honored only if there is an opening on the shift. Hospital policy is not to change an employee's shift unless requested by that employee. Hospital policy further dictates that shift changes, or substitutions, must not take place unless prior arrangements for coverage have been made to insure proper control, and unless the replacement has the qualifications sufficient for proper care.

(7) The concept underlying the staffing pattern is to achieve quality care with adequate coverage each day, giving all employees two days off per week. The prime concern in scheduling is quality care throughout the week, with about the same number of employees working each day. Weekends are treated in this regard like any other days of the week.

(8) In accordance with this policy, Morris initially was employed on the 4 p.m. to midnight shift, and then at her request, was transferred to the midnight to 8 a.m. shift when the opening came.

(9) In the event of an employee's absence from the nursery, due for example to sickness, the position must be filled either by bringing in an employee if possible from another area of the Service, or, as required in most instances, by drawing upon an outside part-time employment service with the prior approval of the Associate Nursing Director. Any replacements obtained from the existing workforce would be employees who already had experience working in the nurseries. An outside nurse replacement at the time of the administrative hearing below cost $54 for an eight hour day. Employees required by emergency

to work beyond their regular shifts receive pay at the overtime rate of time-and-one-half the straight time rate.

(10) Since it is important to maintain continuity for proper patient care, it is undesirable to "float" employees in from outside the Service. Moreover, it is difficult to find trained personnel. Not only does this process constitute a hardship because it is time consuming and risky with respect to quality care, but also it is costly since the outside workers must be paid on a per diem basis through a vouchering procedure.

(11) It is appellant Fincke's professional judgment that it is inconsistent with good patient care to substitute a stranger to the work on a given shift for someone familiar with it. An outsider brought in to cover on a shift does not know the particular needs of the child. Regular employees are better able to perform the essential tasks necessary to prevent infection or death.

Thus, permanent staff normally assigned to the same room, as distinguished from substitutes or part-time professionals hired from the outside, are better for patient care because the permanent employees come to know the babies under their care and their specific needs.

(12) Employees have four personal days a year after three months of employment which they may use any way they wish depending on staffing and patient care needs, but which usually they use for major religious holidays.

(13) Employees scheduled to work on their religious holidays either take a personal day if staffing permits,

or swap places with a colleague not scheduled to work. Employees entitled to exchange places under this policy are those who work in the same service under the same schedule but on different days. Continuity of care does not suffer from this practice because it involves health care workers employed in the same area who may even, by virtue of their normal schedules, at different times care for the same infant.

(14) In scheduling Morris' work, the Hospital made every reasonable effort to grant her Friday nights off, and approved every switch worked out with other employees.

(15) During the first nine years of employment, Morris usually was able to trade places on her Sabbath with either one of two other nurse's aides, but when those employees left, her other co-workers either could not or refused to switch. It then became Morris' practice, without advance warning, to call the Hospital on Friday at the time of her shift to say that she could not come in, resulting in a "conference" between Fincke and Morris in 1975 to deal with her absenteeism.

Having thus learned for the first time of Morris' apparent religious motivation, Fincke thereafter made as many arrangements as possible for Morris to have her Sabbath off, an effort concurred in by her supervisor, Associate Director of Nursing Phyllis Kowalski.

As a result, Morris received more time off than the schedules ordinarily would have allowed. Because no alternative job openings existed which would not have conflicted with Morris' Sabbath, Fincke consulted with Director of Personnel Patricia Melis. Then Fincke sent Morris to explore with Melis what could be done to find an available position satisfactory to her, includ-

ing any in the clinics where scheduling was 9 A.M. to 5 P.M. without shifts, to guarantee Morris her Sabbath off.

(16) Morris' Friday absenteeism triggered complaints from her co-employees that Fincke was playing favorite and that they too wanted their fair share of Fridays off. Personnel Administrator John Cusack sought positions in the Hospital which would not have interfered with Morris' Sabbath, and into which she could have been transferred. Morris was informed of at least two such jobs, for which she was interviewed but failed to qualify, one before and one after her termination.

(17) Although no nurse's aide jobs were available in the clinics, had any such opening occurred, it would have been posted, and Morris would have been considered for it.

(18) Accommodation of Morris would have meant coercion of other workers. Even though there is no union contract, any involuntary displacement would have been contrary to Hospital policy and practice.

(19) Notwithstanding her insistence that she be permitted to take her Sabbath off, Morris conceded that her religious beliefs did not make it wrong to care for infants in the Hospital on the Sabbath. Conceding that it would not violate her conscience on her Sabbath to feed, change, wash and perform tasks for infants directly related to their care, she testified that her objection was grounded in having to do nonessential cleaning, such as emptying trash or washing cribs and isolettes, and radio playing by her co-employees. Yet she did not alert appellants to these problems so that an adjustment could be made in her duties on her Sabbath or in her work environment.

(20) The strict injunction of the Seventh Day Adventist Church not to work on the Sabbath, directed even to police and firemen, does not apply to those of its members who work in hospitals. The Church in its own hospitals urges its employees to be mindful of the needs of others and not expect always to be off on the Sabbath. Even as to Sabbath employment in non-Seventh Day Adventist institutions the Church directs its members to make absolutely clear to their employers the duties they are willing to perform to maintain medical and hygienic patient care.

(21) After several conferences with Morris in which Fincke advised her that the Hospital was short in the nurseries because of her absences and warned her of the consequences, she was terminated on September 7, 1976 for failure to report for work on September 3, 1976.

The State Division of Human Rights found that appellants violated Executive Law Section 296.10 and ordered them *inter alia* to

1. Offer to re-employ Morris as a nurse's aid;

2. Schedule her work shifts so as not to conflict with her Sabbath;

3. Make her whole for back pay; and

4. Promulgate instructions that no person may be fired, barred from employment or retaliated against for refusing to work on his or her Sabbath or other holy days in accordance with the requirements of his or her religion.

The State Human Rights Appeal Board affirmed the Division's Order without reaching appellants' constitutional contentions. The Appellate Division of the Supreme Court

of the State of New York, Second Department, dismissed appellants' constitutional claims as being "without merit." After reargument the Appellate Division adhered to its original determination. Appellants next sought permission of the Appellate Division for leave to appeal to the Court of Appeals. Such permission was denied without opinion. A motion was made to the Court of Appeals for permission to appeal but said motion was also denied without opinion.

The Questions Are Substantial

The constitutional implications of a State law prohibiting discrimination on the basis of religion as does New York Executive Law § 296.10 and as construed to make a right to sabbath observance superior to rights under an otherwise valid seniority system are novel and substantial. The precise questions presented here have never before been treated by this Court.

In *T.W.A.* v. *Hardison,* 432 U.S. 63 (1977), this Court acknowledged but did not reach the constitutional questions raised by Sections 701(j) and 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1)). New York Executive Law Section 296.10 is virtually indistinguishable from its Federal counterpart under Title VII in that both statutes require accommodation of an employee's sabbath observance unless it causes undue hardship to the employer.

The issue in *Hardison* was the extent that Title VII required an employer to accommodate an employee whose religious beliefs prohibited him from working on Saturdays.

The extent of Section 296.10, as well as the constitutionality of a law requiring such accommodation in the face of valid seniority rules and work shift requirements, were the

questions raised below in this case. The reviewing Courts, however, brushed the constitutional arguments aside without discussion. The New York Supreme Court, Appellate Division, relied on *State Division of Human Rights* v. *Genesee Hosp.*, 68 A.D.2d 692, *rev'd sub nom. Matter of Genesee Hosp.* v. *State Div. of Human Rights*, 50 N.Y. 2d 917 (1980), which pointed to the existence of posted alternative job openings at the time of the complainant's discharge, suggesting an "attitude of indifference" toward her in that case (*Genesee*, 68 A.D.2d at 703). Since no job openings existed in this case, the Hospital has in effect been told that compliance with the statute requires creation of a job for appellee Morris, either by changing an otherwise valid shift concept, jeopardizing the proper administration of health care, or by displacing another employee.

It is abundantly clear that the failure to accommodate was neither the consequence of a discriminatory motive nor an "attitude of indifference", but rather due to the operation of the shifts, the suitability of which for administration of patient care has never been rebutted or questioned, and the Hospital's unwillingness to "bump" or coerce other employees.

It is undisputed that the First Amendment applies to the states through the Fourteenth Amendment. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

In order to pass Establishment Clause muster, a law must survive the three-pronged test promulgated in *Committee For Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973): (1) the law must reflect a clearly secular legislative purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.

Section 296.10 fails all three prongs of the test. First, the statute's purpose as reflected in the Memorandum of Bill Introducers (Section 1 of L. 1967, c. 667, p. 1488) is non-secular:

> "The purpose of this bill is to insure observant Jews and other persons observing a day other than Sunday as their Sabbath or religious holiday that their positions are not insecure although they may not be able to work the regular work week."

Second, the statute imposes an affirmative duty to alter business-justified employment practices to fit an individual's religious requirements. Executive Law § 296.10, rather than simply banning discrimination on the basis of religion as it originally was drafted to do, isolates a preference for specific religions (those observing a day other than Sunday as their sabbath) and requires employers to modify their uniform work rules while also discriminating against other employees who do not share the same religious beliefs. Where no discriminatory motive has been demonstrated, and absent past discrimination that must be remedied, requiring the Hospital to modify its uniformly applied work schedules and other evenhanded employment practices in order to accommodate the demands of employees with certain religious beliefs or practices to the disadvantage of others without the same religious convictions constitutes an illegal preference on the basis of religion. The statute perpetuates a preference on account of religion and establishes religion in violation of the Establishment Clause, since it penalizes those employees who do not happen to hold the same religious beliefs as the sabbath observer. "The argument is particularly strong because the religious advantage burdens the other employees and the employer." *Minkus* v. *Metropolitan Sanitary District*, 600 F.2d 80, 86 (7th Cir. 1979).

When this Court faced the issue of whether collectively bargained seniority rights must give way under Title VII when necessary to accommodate religious observances, it decided that the statute was never intended to go that far. *Hardison, supra,* 432 U.S. 63, 79-81. Moreover, this Court said that "the strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others." *Id.* at 79, n.12.

Even though no collective bargaining agreement exists here, the Hospital strictly adheres to a seniority system justified by concerns for proper administration of health care and fairness to its employees. Appellants urge that the public policies supportive of these concerns are at least as important as a policy in favor of preserving the integrity of labor contracts.

Therefore, this Court's rationale in *Hardison* as to the reach of Title VII should be equally applicable in this case regarding the scope of Executive Law § 296.10. If the statute has the effect either as drafted or as applied of forcing a change in the Hospital's operationally justified and otherwise neutral seniority or shift policies, then it is unconstitutional in scope. Under the authority of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court in *Hardison* concluded that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Hardison, supra,* at 82. Such seniority system should weigh the same whether embodied in a formal labor contract or in an employer's personnel policy. Certainly, employees who are its beneficiaries would not discern a difference.

Therefore, to upset a facially neutral seniority system or disrupt an employer's business to accommodate a particular

religious belief as required in this case, violates the Establishment Clause.

Section 296.10 also fails the third prong of the *Nyquist* test in excessively entangling government and religion by requiring a theological determination of the claimed legitimacy of sabbath requirements.

In *Gavin* v. *Peoples Natural Gas Company*, 613 F.2d 482 (3rd Cir. 1980), the Third Circuit Court of Appeals vacated a District Court decision granting summary judgment in favor of an employer in an employment discrimination case brought pursuant to 42 U.S.C. §2000e-2(a)(1) and remanded it for resolution of the fact question whether Gavin's beliefs were accommodated, assuming arguendo they were religious for Section 701(j) purposes. The Circuit Court held that a preliminary fact issue remained because if the employer did accommodate to Gavin's beliefs as required by Title VII, then no Title VII violation was established justifying Constitutional inquiry. The District Court had granted summary judgment on the ground that application of § 701(j) would lead to an unconstitutional entanglement with religion because a ruling on whether defendant had accommodated Gavin's religious beliefs in accordance with § 701(j) would necessitate a judicial determination of the tenets of Gavin's religion in contravention of the Establishment Clause. *Cf. Isaac* v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980). In vacating and remanding for resolution of the fact issue, the Circuit Court left the constitutional issues undecided. *Gavin, supra*, 613 F.2d at 484.

The Third Circuit, while recognizing the importance of the constitutional questions, left them to be resolved another day. However, the District Court's warning has particular relevance to a case such as appellants now urge before this Court:

> We shudder at (and believe the First Amendment would be shaken by) a courtroom scene wherein experts would be cross-examined as to the legitimacy of a specific religious conviction.
> Because proceeding to trial on the facts of this case would necessarily lead to an entanglement of this court with religious beliefs, requiring us to abandon the constitutionally-mandated "hands off" attitude in matters of religion and conscience, we find that this amendment cannot constitutionally be applied to the case before us. 464 F. Supp. at 632.

While "lip service" is given in the statute under examination here to the principle of balancing interests, actually no balancing occurs because as interpreted below the statutory presumption is that religious beliefs outweigh legitimate business concerns. Moreover, in the instant case a resolution of the constitutional questions would be timely because appellants have already been found to have failed to accommodate Morris' religious beliefs where the religious nature of those beliefs for Section 296.10 purposes is disputed.

Therefore, under the First Amendment tests established by the Court, Executive Law Section 296.10 may not properly stand.

Appellants also contend that § 296.10 of the Executive Law is so vague, uncertain and indefinite that it cannot constitutionally stand because it denies due process of law guaranteed by the Fifth and Fourteenth Amendments.

To survive constitutional challenge on vagueness grounds, reasonable precision, objective norms, and intelligible expression are required. *Big Mama Rag, Inc.* v. *U.S.*, 631 F.2d 1030, 1035 (D.C. Cir. 1980). In order to determine the vagueness of a statute, a court must ascertain whether its language provides sufficient definiteness so as to provide

"explicit standards" for those who must apply it. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 622 (1976).

The statute neither defines the religious practices and beliefs it seeks to preserve and protect, nor provides sufficient guidance as to when its exceptions apply. To this day, the Hospital does not know how it must act under this statute except (as expressly required by the Administrative Agency's Order) never to fire, bar from employment or retaliate against any employee who refuses to work on his or her sabbath.

Subparagraph (a) of Section 296.10, in failing to define "observance" of a sabbath in accordance with a person's religion, invites the very constitutionally repugnant theological debate which occurred below, in which the sincerity of appellee Morris' claim in light of her admissions about what she could and could not do on her Sabbath was cast in doubt.

As stated by the District Court in the *Gavin* case, 464 F. Supp. 622 (W.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 482 (3rd Cir. 1980) concerning the due process denial:

> . . . . Since we have such difficulty defining religion in a legal context, we realize how difficult it must be for employers to understand their responsibilities under the "religious accommodation" provision and how valid due process denials or "vagueness" arguments could be asserted. These "due process" and "establishment" problems are like the blanket which, when pulled up over the head, uncovers the feet. Any legislative definition would make the limits of protection of the act more clear and ease our due process concerns; however, since all definitions are inclusive and exclusive by nature, any legislative judicial definition of religion invites a First Amendment problem. *Id.* at 632-633.

Similarly unclear in subparagraph (b) are the words "emergency" and "indispensable", which the statute leaves undefined.

The broad exclusions in subparagraph (c) for positions dealing with health or safety reasonably should have applied to appellee Morris' nursing position at the Hospital. Yet this contention also was rejected by the courts below without discussion, leaving no clue as to whether the statute would apply to any position within any health care institution such as the Hospital. The Agency argued below that the Hospital should have done more to coax its employees to switch places with Morris. However, neither the Hospital nor any other employer should have to guess about an affirmative duty not contained in a statute, especially where the effort appears futile.

It is respectfully urged that the burden of coping with these ambiguities now unconstitutionally lies with the employers of this State. The statute is utterly and improperly silent about an employer's duty when, as here, no alternative jobs are open which do not encroach upon an employee's sabbath requirements. Accordingly, the statute should be void for vagueness under the Due Process clauses of the Fifth and Fourteenth Amendments.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

PETER D. STERGIOS

SHEA & GOULD
Counsel for Appellants
330 Madison Avenue
New York, New York 10017

Dated: New York, New York
August 18, 1982

APPENDIX

Decision of Court of Appeals Denying Leave to Appeal to the Court of Appeals

NORTH SHORE UNIVERSITY HOSPITAL;
FLORENCE FINCKE, et al.,

Appellants,

vs.

STATE HUMAN RIGHTS APPEAL BOARD,
STATE DIVISION OF HUMAN RIGHTS, ESSIE MORRIS,

Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursement.

May 20, 1982

Decision of Appellate Division, Second Department, Denying Leave to Appeal to the Court of Appeals

Motion by petitioners for leave to appeal to the Court of Appeals from an order of this court, dated June 1, 1981, which confirmed respondent's State Human Rights Appeal Board, dated November 24, 1980, which order affirmed an order of the respondent State Division of Human Rights, dated July 27, 1980, which decision and order of this court were adhered to by order on reargument dated October 14, 1981.

Motion denied, without costs.

LAZER, J.P., MANGANO, GIBBONS & GULOTTA, JJ., concur.

February 4, 1982

Order of Appellate Division, Second Department, Adhering to Original Determination After Reargument

NORTH SHORE UNIVERSITY HOSPITAL et al.,

Petitioners,

v.

HUMAN RIGHTS APPEAL BOARD et al.,

Respondents.

Motion by petitioners (1) for reargument for review of the order of the respondent State Human Rights Appeal Board, dated November 24, 1980, which affirmed an order of the State Division of Human Rights, dated July 27, 1980, which was confirmed by order of this court, dated June 1, 1981, or in the alternative, (2) for leave to appeal to the Court of Appeals.

The motion having been granted insofar as it was for reargument by order, dated September 18, 1981, and the parties having been heard on October 14, 1918, after oral argument the court adheres to its original determination. HOPKINS, J. P. MANGANO, GULOTTA & MARGETT, JJ., concur.

October 16, 1981

Order of Affirmance of Appellate Division

Filed in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 1, 1981

HON. JAMES D. HOPKINS,
Justice Presiding,
HON. GUY J. MANGANO,
HON. FRANK A. GULOTTA,
HON. CHARLES MARGETT.
Associate Justices

NORTH SHORE UNIVERSITY HOSPITAL *et al.*,

Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD *et al.*,

Respondents.

Original order and papers filed with proceedings instituted in this court.

A proceeding having been instituted in this court pursuant to section 298 of the Executive Law, by petition of North Shore University Hospital et al., verified December 23, 1980, to review an order of the respondent State Human Rights Appeal Board, dated November 24, 1980, which affirmed an order of the respondent State Division of Human Rights, dated July 27, 1980, which found that the petitioners had discriminated against complainant Essie Morris, by failing to accommodate her observance of the Sabbath

and by terminating her employment in violation of section 296 (subd 10) of the Executive Law; and The State Division of Human Rights, respondent and Essie Morris, respondent, having filed answers thereto;

Now, upon the said petition; the said answers; and upon all the papers filed herein; and the said proceeding having been submitted by Peter D. Stergios, Esq., of counsel for petitioners, submitted by Jerome H. Field, Esq., of counsel for respondents Essie Morris and *argued by* Sara Toll East, Esq., of counsel for respondent State Division of Human Rights; due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously.

ORDERED that the said order is hereby confirmed and the petition dismissed, without costs or disbursements.

Enter:

/s/ IRVING N. SELKIN
Clerk of the Appellate Division

Opinion of Appellate Division

JAMES D. HOPKINS, J.P.
GUY J. MANGANO
FRANK A. GULOTTA
CHARLES MARGETT, JJ.

NORTH SHORE UNIVERSITY HOSPITAL et al.,

Petitioners,

v.

STATE HUMAN RIGHTS APPEAL BOARD et al.,

Respondents.

Shea & Gould, New York, N.Y. (Peter D. Stergios of counsel; Howard B. Adler on the brief), for petitioners.

Jerome H. Field, Brooklyn, N.Y., for respondent Essie Morris.

Ann Thacher Anderson, New York, N.Y. (Sara Toll East of counsel), for respondent State Division of Human Rights.

Proceeding pursuant to section 298 of the Executive Law to review an order of the respondent State Human Rights Appeal Board, dated November 24, 1980, which affirmed an order of the respondent State Division of Human Rights, dated July 27, 1980, which found that the petitioners had discriminated against complainant Essie Morris, by failing to accommodate her observance of the Sabbath and by terminating her employment in violation of section 296 (subd 10) of the Executive Law.

Order confirmed and petition dismissed, without costs or disbursements.

The finding of the State Division of Human Rights, that petitioners placed the burden upon the complainant, Essie Morris, a Seventh Day Adventist, to find other workers who were willing to "swap" assignments with her in order to permit her to observe her Sabbath, was supported by substantial evidence appearing on the record considered as a whole (*300 Gramatan Ave. Assoc.* v. *State Div. of Human Rights*, 45 NY2d 176). As noted by Mr. Justice SIMONS, in his dissenting opinion in *State Div. of Human Rights* v. *Genessee Hosp.* (68 AD2d 692, 701, 703 revd *sub nom Matter of Genessee Hosp.* v. *State Div of Human Rights*, 50 NY2d 917, on the dissenting opn of the Appellate Division insofar as it relates to the finding of discrimination) "an employer has an affirmative duty to make reasonable attempts to accommodate [the known religious beliefs of] its employees or to prove that such efforts would be unavailing * * * [An employee] should not [be] forced to rely upon the good will of her coworkers or her powers of persuasion, else be relegated to choosing between her religious beliefs and her employment."

Furthermore, petitioners did not meet their burden of proving that they were exempt from complying with the provisions of section 296 (subd 10) of the Executive Law on any of the grounds set forth in paragraphs (b) and (c) thereof.

We have considered petitioners' remaining contentions and find them to be without merit.

HOPKINS, J.P., MANGANO, GULOTTA and MARGETT, JJ., concur.

June 1, 1981

Order of State Human Rights Appeal Board

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
Case No. E-C-44227-76E
APPEAL No. 5997
Argued: Nov. 16, 1979

STATE DIVISION OF HUMAN RIGHTS on the complaint of ESSIE MORRIS, COMPLAINANT-RESPONDENT

vs.

NORTH SHORE UNIVERSITY HOSPITAL, FLORENCE FINCKE, Assistant Director, Maternal Child Health,

Respondent-Appellant

Presiding:

HONORABLE RICHARD WONG

Appearances:

Jack Cusack, Personnel Administrator, on behalf of Respondent-Appellant.

Peter D. Stergois, Esq., on behalf of Respondent-Appellant.

Marc Reston, Esq., on behalf of Respondent-Appellant.

Essie Morris, Complainant-Respondent.

Jerome H. Field, Esq., on behalf of Complainant-Respondent.

Sara Toll East, Esq., on behalf of State Division of Human Rights.

Order of State Human Rights Appeal Board

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *300 Gramatan Avenue Associates* v. *State Division of Human Rights*, 45 N.Y.2d 176, and

A majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ IRMA VIDAL SANTAELLA
Irma Vidal Santaella
Chairman

Dated and Mailed: November 24, 1980

DISTRIBUTION LIST

RESPONDENT-APPELLANT
NORTH SHORE UNIVERSITY HOSPITAL
300 Community Drive

Manhasset, New York, 11030
Att: Ms. Florence Fincke
Mr. Jack Cusack, Personnel Administrator

Ms. Florence Fincke, Assistant Director
Maternal Child Health
North Shore University Hospital
300 Community Drive
Manhasset, New York 11030

Shea, Gould, Climenko & Casey, Esqs.
330 Madison Avenue
New York, New York 10017
Att: Marc T. Reston, Esq.
Att: Peter Stergios, Esq.

Complainant-Respondent
Ms. Essie Morris
178-47 Grandall Avenue
Springfield Gardens, New York 11434

Jerome H. Field, Esq.
187-15 Linden Boulevard
St. Albans, New York 11230

Dohr.
Commissioner Werner Kramarsky
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

Ann T. Anderson, Esq.
General Counsel
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047
Att: Sara Toll East, Esq.

Hon. Robert Abrams
Attorney General
2 World Trade Center
New York, New York 10047

Notice of Order After Hearing of the Commissioner of the State Division of Human Rights

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
Case No. (S) E-C-44227-76E

STATE DIVISION OF HUMAN RIGHTS on the complaint(s) of
ESSIE MORRIS,

Complainant,

—against—

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH,

Respondents.

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Amos Carnegie, Esq. In accordance with the Division's Rules of Practice, copies of this Order have been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047, and at 183 Fulton Avenue, Hempstead, New York 11550. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to this proceeding may appeal this Order to the State Human Rights Appeal Board by filing with the Board a written notice of appeal within fifteen (15) days after service of this Order. The notice of appeal must be filed

by mail or in person at the office of the State Human Rights Appeal Board, Room 8234, 2 World Trade Center, New York, New York 10047. DO NOT FILE THE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board.

Dated: July 12, 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/S/ WERNER H. KRAMARSKY
Commissioner

To:

MS. ESSIE MORRIS
178-47 Crandall Avenue
Springfield Gardens, New York 11434

NORTH SHORE UNIVERSITY HOSPITAL
300 Community Drive
Manhasset, New York 11030
Attention Ms. Florence Fincke

MS. FLORENCE FINCKE, Assistant Director
Maternal Child Health
North Shore University Hospital
300 Community Drive
Manhasset, New York 11030

JEROME H. FIELD, Esq.
187-15 Linden Boulevard
St. Albans, New York 11230

Notice of Order After Hearing

SHEA, GOULD, CLIMENKO & CASEY, Esqs.
THOMAS A. ANDREWS, Esq., of Counsel
330 Madison Avenue
New York, New York 10017

ANN THACHER ANDERSON, Esq., General Counsel
HERBERT HERSKOWITZ, Esq., of Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

HON. ROBERT ABRAMS
Attorney General
2 World Trade Center
New York, New York 10047

Proceedings

STATE OF NEW YORK: EXECUTIVE DEPARTMENT

STATE DIVISON OF HUMAN RIGHTS

CASE NO. (S)E-C-44227-76E

STATE DIVISION OF HUMAN RIGHTS

---

on the complaint(s) of

ESSIE MORRIS,

Complainant,

—against—

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH,

Respondents.

On the 3rd day of September, 1976, the above-named Complainant filed a verified complaint, hereinafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law, Article 15, of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Amos Carnegie, Esq., an Administrative Law Judge of the Division. The hearing was held on July 25, 1977, September 28, 1977, March 9, 1978 and May 10, 1978.

Proceedings

Complainant and Respondents appeared at the hearing. Complainant was represented by Jerome H. Field, Esq. Respondents were represented by Shea, Gould, Climenko & Casey, Esqs., by Thomas A. Andrews, Esq., of Counsel. The Division was represented by Beverly Gross, Esq., then General Counsel, by Daniel Campbell, Esq., of Counsel.

The final transcript was received by the Division June 1, 1978.

FINDINGS OF FACT

1. Complainant Essie Morris has been a member of the Seventh Day Adventist Church since July, 1964.

2. Complainant, a nurse's aide, began working for Respondent North Shore University Hospital (hereinafter "North Shore") in August, 1967. She was told by Ms. Swenson, the person who interviewed her for the job that they would try to accomodate her by allowing her to be off on her Sabbath.

3. For approximately nine years, Complainant was usually able to exchange days with co-workers Elaine Gordon and Elsie Hughes who would work for Complainant on Fridays so that Complainant could observe her Sabbath from sundown Friday to sundown Saturday.

4. Complainant worked the night shift and requested to be off on Thursdays and Fridays. She was willing to work Saturday nights, Sunday nights, and any other day or night so long as she had Friday nights off, but the other workers in her area began to request Thursday and Fridays, and so "the problem really began."

5. Elsie Hughes who had switched Fridays with Complainant became sick and thereafter retired from the job.

Elaine Gordon had a particular reason for wanting Friday nights off and consequently Complainant was no longer able to switch with her.

6. Complainant asked Respondent Florence Fincke, Assistant Director of Nursing, Maternal and Child Health, her supervisor, if she could have Fridays off. She stated that she would be willing to work Saturday and Sunday nights to make up the time. Ms. Finke, after talking with the hospital administration, informed Complainant that her request could not be granted. Complainant then told Patricia Melis in the personnel department about the problem she was having. Patricia Melis advised Complainant that she called Respondent North Shore's lawyer who said Complainant could not have Fridays off.

7. On or about August 5, 1976, Complainant gave notice to Respondent North Shore that she wished to observe her Sabbath in the following memorandum: "The purpose of this memorandum is to state and make very clear my reason for not coming in to work on Friday nights and Saturday days. The *reason* is, from *sunset Friday* to *sunset Saturday* I am *worshipping* my GOD, and keeping his commandments. For this reason do I not come in to work on Friday nights and Saturday days. The Friday nights and Saturday days I have not been there up until this date can be attributed to the reason given above. However, I am willing to compromise and work another day or days in place of my *SABBATH*."

8. In addition, S.W. Stovall, Executive Secretary of Northeastern Conference of Seventh Day Adventists, wrote a letter to Respondent North Shore on August 11, 1976, in which he stated in Complainant's behalf that: "Mrs. Essie Morris, an employee of your hospital, is an active, practic-

ing Seventh-day Adventist. She holds membership in the Jamaica Seventh-day Adventist Church, New York.

One of the cardinal doctrines of the Seventh-day Adventist Church is the command to observe the seventh-day Sabbath: Saturday (Exodus 20). Sabbath is observed from sundown Friday night to sundown Saturday night (Genesis 1). Mrs. Morris adheres to the teachings of the Bible as found in the Seventh-day Adventist Church and wishes to be a conscientious Sabbath keeper and not work during the Sabbath hours. It is my understanding that she had given nine satisfactory years of service. She is willing to make up the time off for Sabbath by working any other day or night, including sundays."

9. The record establishes that Respondent North Shore had regularly accommodated employees who desire to attend school by transferring them to another shift. Respondent Fincke testified that "we do make provisions to transfer them to another shift where there is an opening. If they want to go to school in the evening, we transfer them to nights or days. Usually we try to work it out with the employees if they are going to further their education." In regard to Complainant's requirement that she be off on Fridays in order to follow the dictates of her religion, Respondent North Shore placed the burden upon Complainant to find a fellow worker to swap her Fridays with, and when Complainant are no longer able to find a worker to swap with Respondent North Shore made no bona fide effort to accommodate Complainant.

10. Respondent North Shore has three shifts. The day shift is 8 a.m. to 4 p.m., the evening shift is 4 p.m. to 12 midnight, and the night shift is 12 midnight to 8 a.m. In order to observe her Sabbath, there were four shifts a week

that Complainant could not work: "4 to 12 on Friday, 12 to 8 on Saturday, 8 to 4 on Saturday and 4 to 12 on Saturday."

11. Respondent North Shore employs approximately 100 nurse's aides. Nurse's aides who work in the clinics generally work the day shift, 8 a.m. to 4 p.m., and they are off on Saturdays and Sundays.

12. On September 7, 1976, Complainant was terminated by Phyllis Kowakski, Associate Director of Nursing. The following basis for termination was given: "On August 27th you were given a Warning Notice in regards to not reporting for work. You did not appear for work on Friday, September 3, 1976, therefore I am terminating you as of today."

13. Respondent North Shore, Respondent Florence Fincke and Phyllis Kowakski discriminated against Complainant Essie Morris by failing to accommodate her as a Sabbath observer and by terminating her in violation of the Human Rights Law.

14. Complainant suffered monetary damage as the result of such discriminatory acts.

OPINION

Respondents have not established that the accommodation of Complainant with respect to scheduling her hours so that she would be off on her Sabbath would have caused undue economic hardship. The fact that other employees may have resented such accommodation for Complainant is not controlling. It is clear from the record that Respondent did not make a real bona fide effort to rearrange Complainant's work so that she would be off on her Sabbath.

DECISION

On the basis of the foregoing, I find that Respondents North Shore University Hospital and Florence Fincke discriminated against Complainant by failing to accommodate her observance of her Sabbath, and terminated her employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

Upon the foregoing Findings of Fact and pursuant to the provisions of the Human Rights Law, it is hereby

ORDERED, that Respondents, their agents, servants, employees, representatives, successors and assigns shall cease and desist from maintaining a policy which refuses to accommodate Sabbath observers, thereby denying them employment, or otherwise discriminates against such Sabbath observers in the terms, conditions and privileges of employment because of the observance of their Sabbath; and it is further

ORDERED, that the Respondents, their agents, servants, employees, representatives, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent North Shore University Hospital shall forthwith offer to re-employ Essie Morris as a nurse's aide. Complainant shall be allowed ten (10) business days within which to accept or reject said offer of employment.

2. Respondent North Shore University Hospital shall schedule Complainant's work shifts so that she will not have to work on her Sabbath.

3. The Respondent North Shore University Hospital shall, within thirty (30) days from the date hereof, pay to the Complainant Essie Morris, a sum of money based on what she would have earned had she not been terminated on September 7, 1976 to the date the Complainant accepts or rejects the offer of re-employment, less the standard payroll deduction and less any wages she may have earned during this period. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from the date that Respondent terminated Complainant, September 7, 1976, to the date that the Complainant accepts or rejects the Complainant's offer. Respondent shall furnish proof of payment within ten (10) business days thereof to the State Division of Human Rights, 2 World Trade Center, New York, New York 10047, Attention Ann Thacher Anderson Esq., General Counsel.

4. Respondent North Shore University Hospital shall grant the Complainant all the rights, privileges, benefits, seniority and pay raises she would have received or been entitled to receive had she not been terminated on the date specified in paragraph (3) above.

5. Respondent shall instruct, in writing, all of its appointing personnel, supervisory employees, agents and officers that no person may be fired or barred from employment and that no retaliatory action may be taken against any employee

who refuses to work on his or her Sabbath or other holy days in accordance with the requirements of his or her religion.

6. Respondent shall make available to the duly-authorized representatives of this Division such information and documents as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: Jul 27 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERBER H. KRAMARSKY
Werber H. Kramarsky
Commissioner

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS

OF THE STATE OF NEW YORK

Motion No. 396

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

Notice is hereby given that North Shore University Hospital and Florence Fincke, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, denying appellant's motion for leave to appeal, entered in this action on May 20, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

SHEA & GOULD
Counsel for Appellants
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Notice of Appeal to the Supreme Court of the United States

To:

STATE HUMAN RIGHTS APPEAL BOARD
2 World Trade Center
New York, New York 10047

ANN THACHER ARMSTRONG, General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

JEROME H. FIELD, Esq.
Box 292, Midwood Station
Brooklyn, New York 11236

Affidavit of Mailing

COURT OF APPEALS OF
THE STATE OF NEW YORK } ss

REBECCA M. MCCABE, being duly sworn, deposes and says: that deponent is in the employ of Shea & Gould, attorneys for . Appellants herein, is over 18 years of age, is not a party to this action and resides at 12 Parliament Dr., New City, New York 10956. On the 12th day of August , 1982, deponent served the within Notice of Appeal to the Supreme Court of the United States on the following at the address designated by them for that purpose:

STATE HUMAN RIGHTS APPEAL BOARD
2 World Trade Center
New York, New York 10047

ANN THACHER ARMSTRONG, General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

JEROME H. FIELD, Esq.
Box 292, Midwood Station
Brooklyn, New York 11236

by depositing a true and correct copy of the same, properly enclosed in a postpaid wrapper in the official depository maintained and exclusively controlled by the United States Government at 330 Madison Avenue, New York, New York 10017.

/s/ REBECCA MCCABE
Rebecca McCabe

Sworn to before me this 12th day of August , 1982.

/s/ EVELYN PERSICO
Notary Public
No. 4725752
Qualified in New York County
Commission Expires March 30, 1984

Restatement of Questions Presented

1. Was the Appellate Division* the highest court of New York in which a decision could be had within the meaning of 28 U.S.C. § 1257(2)?

2. Are appellants' challenges to the constitutionality of the Human Rights Law, N.Y. Exec. Law § 296.10 (McKinney, 1982) sufficiently substantial to warrant review by this Court?

---

* This appeal is from orders of the Appellate Division dated June 1, 1981, and October 16, 1981, set forth in the Jurisdictional Statement at 4a and 3a respectively and not as stated by appellants in Jurisdictional Statement at 2, from the order of the New York Court of Appeals denying appellants' motion for leave to appeal. See 12 Moore's Federal Practice § 509.01 (2nd ed. 1982).

TABLE OF CONTENTS

	PAGE
Restatement of Questions Presented	1
Statues Involved	2
Statement of the Case	2
Argument	
I—The Appeal Is Not Within the Court's Jurisdiction	4
II—The Appeal Does Not Present a Substantial Federal Question	5
Conclusion	11

TABLE OF AUTHORITIES

PAGE

Cases:

CSC v. Letter Carriers, 413 U.S. 548 (1973) 7, 8

Gorman v. Washington University, 316 U.S. 98 (1942) 5

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 10

Matter of Schweizer Aircraft Corp. v. State Division of Human Rights, 48 N.Y.2d 294 (1979) 8, 10

Nottelson v. Smith Steel Workers, D.A.L.U. 19806, 643 F.2d 445 (7th Cir. 1981) *cert. denied* —— U.S. ——, 70 L.Ed. 2d 488 (1981) 6

People v. Cruz, 48 N.Y.2d 419 (1979) 8, 9
People v. Fagan, 194 App. Div. 185 (2d Dept. 1920).... 8

Rankins v. Commission on Professional Competence, 24 Cal. 3d 167 (1979) *appeal dismissed*, 444 U.S. 986 (1979) 5, 6

Sherbert v. Verner, 374 U.S. 398 (1963) 8
Southern Electric Co. v. Stoddard, 269 U.S. 186 (1925) 5

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 6

Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940) 8

PAGE

Statutes:

Federal:

28 U.S.C. § 1257(2) 1, 2, 4
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)1, 2000e(j) 6

State:

N.Y. Civil Practice Law and Rules §§ 5601(b)(1), 5602 ..... 2, 4
N.Y. Executive Law, Art. 15, § 296.10 (McKinney 1982) (Human Rights Law) 1, 2, 4, 5, 6, 7, 8, 9, 10
N.Y. Statutes § 232 (McKinney (1971) 8
1976 Session Laws of New York 1488, 1539 (McKinney) 9, 10

Constitutional Provisions:

N.Y. Const. Art VI § 3(b)(1) 4

Miscellaneous:

12 Moore's Federal Practice § 509.01 (2nd ed. 1980) 1

No. 82-293

Supreme Court of the United States

October Term, 1982

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,
Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,
Appellees.

On Appeal from the Supreme Court of the State of New York, Appellate Division, Second Department

MOTION TO DISMISS

Appellee State Division of Human Rights moves pursuant to Rule 16.1(a) and (b) of the Revised Rules of this Court to dismiss this appeal bacause:

(1) The appeal is not within the Court's jurisdiction.

(2) Appellants do not raise any substantial federal questions.

Statutes Involved

1. 28 U.S.C. § 1257(2) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

2. The relevant provisions of the Human Rights Law* are set forth in the Jurisdictional Statement at 4-5.

3. N.Y. Civ Prac. Law § 5601(b)(1) (McKinney 1978) provides:

> . . . .
>
> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> (1) from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States. . . .

Statement of the Case

Appellants are attempting to appeal to this Court from a denial by the New York Court of Appeals of a motion for leave to appeal.

---

* Executive Law § 296.10 (McKinney 1982).

That order leaves undisturbed a decision of the Appellate Division which confirmed an order of the State Human Rights Appeal Board which had affirmed an order of the State Division of Human Rights.

The administrative orders sustained by the Appellate Division find that appellants had violated Section 296.10 of the Human Rights Law by terminating complainant Essie Morris for refusing to work on her Sabbath.

Essie Morris, a Seventh-day Adventist, was one of 100 nurses aides employed by appellants. When Morris was hired in 1967, she informed appellant Hospital that because she was an Adventist she would be unable to work on her Sabbath, which is from sundown Friday to sundown Saturday. Nurses aides are employed in the clinic, which is open only on weekdays from 8:00 a.m. to 4:00 p.m. This assignment would not have interfered with Morris's Sabbath observance. However, Morris was assigned to the hospital nurseries, which function around the clock seven days a week. There, nurses aides are assigned days off on a rotating basis.* For nine years, whenever Morris was scheduled to work on Friday nights, she found either of two employees to switch nights off with her.

In 1976, one of the two employees retired and the other became unavailable on Friday night. Morris was unable to find other employees willing to switch with her. When this happened, Morris offered to work six nights, every Saturday and Sunday night or any other night or day to make up the time so long as she could have her Sabbath off. She also requested a transfer to the clinic. Despite

* There is no union and no collective bargaining agreement.

her requests, Morris continued to be scheduled, on rotation, Friday night shifts. Each time she was scheduled for Friday night, she informed appellants that she could not report to work because of her Sabbath observance.

On August 27, 1976, Morris was given a warning notice concerning failure to report for work on Friday nights. On September 7, 1976, Morris was terminated for failure to work Friday, September 3, 1976.

The Division of Human Rights found appellants had discriminated against Morris and had violated the Human Rights Law § 296.10 by terminating her for refusing to work on her Sabbath. The Appellate Division affirmed the Division's finding. Appellants sought and were denied leave to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5602(a). Appellants did not invoke N.Y. Civ. Prac. Law § 5601(b)(1).

ARGUMENT

I

The Appeal Is Not Within the Court's Jurisdiction.

The Appellate Division was not the highest court in which a decision could be had within the meaning of 28 U.S.C. § 1257(2). Appellants could have appealed as of right to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5601(b)(1), see N.Y. Const. Art. VI § 3(b)(1) for decision of their constitutional claim. By overlooking or rejecting this option, appellants failed to obtain a decision from the State's highest court.

Appellants have failed to exhaust all the possibilities afforded by state procedure for review. See *Gorman* v. *Washington University*, 316 U.S. 98 (1942). The appeal must therefore be dismissed. See *Southern Electric Co.* v. *Stoddard*, 269 U.S. 186 (1925).

II

The Appeal Does Not Present a Substantial Federal Question.

Appellants raise three claims concerning the Sabbath observer provision of the Human Rights Law. None presents a substantial federal question.

A. *First Issue:* Facial validity under the Establishment Clause of the First Amendment of Section 296.10 of the Human Rights Law.

Appellants argue that Section 296.10 on its face violates the Establishment Clause. The argument fails to raise a substantial federal question. See *Rankins* v. *Commission on Professional Competence*, 444 U.S. 986 (1979),* dismissing an appeal from 24 Cal. 3d 167 (1979).

The California Supreme Court construed its constitutional prohibition against religious discrimination in employment as imposing on employers the duty of reasonable accommodation of employee absences for Sabbath observance and for religious holidays, unless to do so would cause the employer undue hardship. In reaching its decision, that Court, interpreting the prohibition as consistent with Sec-

* Brennan, Blackmun and Stevens, JJ., would have noted probable jurisdiction.

tion 701(j) of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e(j),* held the prohibition constitutional under the Establishment Clause of the First Amendment. In dismissing the appeal, this Court summarily upheld, under the Establishment Clause, the duty of reasonable accommodation imposed by the California Supreme Court and Title VII of the Civil Rights Act of 1964. See *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 453 (7th Cir. 1981), *cert. denied*, —— U.S. ——, 70 L. Ed. 2d 488 (1981).**

The duty imposed by Section 296.10 of the Human Rights Law closely resembles the duty imposed by Title VII and the California Supreme Court. Appellants have failed to demonstrate that the issue raised in this case is more deserving of plenary consideration than the issue dismissed summarily for want of a substantial federal question in *Rankins*.

B. *Second Issue:* Validity under the Establishment Clause of Section 296.10 of the Human Rights Law as applied.

Appellants argue that Section 296.10 as applied to them is unconstitutional. Although constitutional questions could have been raised if appellants had been compelled to incur substantial costs to accommodate Morris, "[T]he constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting).

* The relevant provisions of Title VII are set forth in the Jurisdictional Statement at 3.

** Brennan and Marshall, JJ., would have granted certiorari.

Essie Morris's Sabbath requirements could have been accommodated without even an exemption from a work rule. Appellant Hospital had nine years notice of Morris's Sabbath requirement during which it could have assigned her to the clinic to safeguard her Sabbath observance.

There would have been no need to vary uniform scheduling of shifts or to require other employees to take over Morris's shifts. The transfer would not have cost appellant Hospital any money and would not have caused any hardship to other employees. It would have avoided even the semblance of a constitutional confrontation.

C. *Third Issue:* Vulnerability of Section 296.10 of the Human Rights Law to challenge as void for vagueness.

Appellants argue that the language of Section 296.10 is so vague that it denies due process of law. This Court has recognized that, "[T]here are limitations in the English language with respect to being both specific and manageably brief. . . ." *CSC* v. *Letter Carriers,* 413 U.S. 548, 578-579 (1973).

The plain meaning of the statute, together with its legislative history and clear judicial interpretation of relevant language provide ample notice to employers of their duties under Section 296.10.

1. Sabbath Observance

No "theological debate"* is required to inform employers that the Sabbath observance of a Seventh-day

* Jurisdictional Statement at 20.

Adventist requires abstention from work from sundown Friday to sundown Saturday. It has been recognized and protected by the Supreme Court under the Constitution, see *Sherbert* v. *Verner*, 374 U.S. 398 (1963), as well as by the highest court in New York under Section 296.10. *Matter of Schweizer Aircraft Corp.* v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979).

2. "Emergency"

Even though no definition of a word is set forth in a statute, it does not follow that the word is without a clear meaning. See *People* v. *Cruz*, 48 N.Y.2d 419, 427 (1979). Emergency is a term that "the ordinary person exercising ordinary common sense can sufficiently understand . . . ." *CSC* v. *Letter Carriers*, 413 U.S. at 579.

"Emergency" is a word of ordinary import which, since the Legislature did not indicate otherwise, is to be given its ordinary and usual meaning, N.Y. Statutes § 232 (McKinney 1971). It is defined as "a sudden unexpected happening; an unforeseen occurrence or condition . . ."* Black's Law Dictionary 469 (5th ed. 1979). And so it is understood by this Court: "We think of emergencies as suddenly arising and quickly passing," *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 39 (1940), and in New York: "[A]n apt term for 'a sudden or unexpected occasion for action, exigency; pressing necessity' Cent. Dict." *People* v. *Fagan*, 194 App. Div. 185, 193 (2d Dept. 1920).

Since "emergency" is a word with a commonly accepted meaning, it cannot be said to lack sufficient guidelines to

* Essie Morris testified that she could work on her Sabbath during an emergency. It was the regular scheduling on her Sabbath that violated her religious obligation.

satisfy the requirements of due process. See *People* v. *Cruz*, 48 N.Y.2d 419, 428 (1979).

3. "Indispensable"

The statute provides the employer with an exemption where the "personal presence" of the Sabbath observer "is indispensable to the orderly transaction of business." Section 296.10(b). The bill introducers stated that this exemption would "not apply to situations where another employee can temporarily fill in for the Sabbath observer." Memorandum of Bill Introducers, 1967 N.Y. Sess. Laws 1487 (McKinney).*

And in approving the bill, Governor Rockefeller stated: "The exception would operate only in the most unusual situations, where the performance of the particular job is essential and where no one other than the particular job holder can perform the job." Governor's Memorandum of Approval, 1967 N.Y. Sess. Laws 1538 (McKinney).

It is clear that appellants did not come within this exception since they required that Morris either work or find a substitute. Appellants' objection was not to a substitute, but to the duty to refrain from scheduling Morris on her Sabbath.

4. "Health or Safety"

There is another exception for any position dealing with health or safety where the person holding such position

* Section 296.10, adopted in 1967, applied only to public employment. 1967 N.Y. Laws ch. 667. In 1971, Section 296.10 was amended to expand its coverage to the private sector. 1971 N.Y. Laws ch. 674.

must be available for duty whenever needed. . . ." Section 296.10(c). In his Memorandum of Approval, Governor Rockefeller stated: "Positions involving public health or safety where the holder must be on call at any time . . . such as police or fire positions, would be excluded. . . ." 1967 N.Y. Sess. Laws 1538 (McKinney).

Essie Morris was not "on call." She was on a regular, although rotating, night schedule. It was the regular scheduling on Friday nights that Essie Morris could not comply with. Here again there could be no doubt that appellants in this instance were not within the health and safety exclusion of Section 296.10(c).

The employer's affirmative duty under the statute was clearly spelled out by the Court of Appeals: "[E]mployers must make good faith efforts to seek accommodation." *Matter of Schweizer Aircraft Corp.* v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979). Appellants made no effort, and therefore cannot claim denial of due process. "No constitutional value is served by permitting persons who have avoided any possibility of attempting to ascertain how they may comply with a law to claim that their studied ignorance demonstrates that the law is impermissibly vague." *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 636 (1976) (Rehnquist, J., dissenting).

Conclusion

The Appeal Should Be Dismissed.

Dated: October 13, 1982

Respectfully submitted,

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Appellee
State Division of Human Rights
Two World Trade Center
New York, New York 10047
(212) 488-5376

SARA TOLL EAST
Of Counsel

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-293

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS

PETER D. STERGIOS
SHEA & GOULD
Counsel for Appellants
330 Madison Avenue
New York, New York 10017
(212) 370-8000

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Statutes Involved	1
Counter Statement of the Case	2
Argument	
I—The Appeal Is Within The Court's Jurisdiction	3
II—The Appeal Presents Substantial Federal Questions	5
Conclusion	9

TABLE OF AUTHORITIES

Cases

Augstein v. *Levey*, 2 N.Y.2d 902 (1957)	5
Gavin v. *Peoples Natural Gas Company*, 464 F. Supp. 622, *rev'd* 613 F.2d 482 (3rd Cir. 1980)	6
Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976)	8
Matter of Haydon v. *Carroll*, 225 N.Y. 84 (1918)	3, 4
Matter of Schweizer Aircraft Corp. v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979)	7
Nottelson v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1981) *cert. denied*, —— U.S. ——, 70 L.Ed.2d 488 (1981)	6

PAGE

Rankins v. *Commission on Professional Competence*, 24 Cal.3d 167 (1979) *appeal dismissed*, 444 U.S. 986 (1979) 5, 6

Sherbert v. *Verner*, 374 U.S. 398 (1963) 7

Unger v. *Falconer*, 2 N.Y.2d 731 (1956) 5

Statutes

Federal:

28 U.S.C. § 1257(2) 1, 5

State:

N.Y. Civ. Prac. Law § 5601(b)(1) 3

N.Y. Civ. Prac. Law § 5602(a)(1)(i) 2, 5

N.Y. Civ. Prac. Law § 5602(b)(2)(i) 2, 5

N.Y. Executive Law § 296.10 (Human Rights Law) 5, 6, 7, 8

1976 Session Laws of New York, 1488, 1539 (McKinney) 7, 8

Miscellaneous

7 Weinstein, Korn & Miller, N.Y. Civil Practice (1981), ¶ 5601.9 ..... 3, 4

Supreme Court of the United States

October Term, 1982

No. 82-293

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS

Appellants North Shore University Hospital and Florence Fincke submit this brief pursuant to Rule 16.5 of the Revised Rules of this Court in opposition to appellees' motion to dismiss this appeal because:

(1) The appeal is within the Court's jurisdiction.

(2) Appellants have raised substantial federal questions.

Statutes Involved

1. The relevant provisions of 28 U.S.C. § 1257(2) are set forth in the Motion to Dismiss at 2.

2. The relevant provisions of the Human Rights Law are set forth in the Jurisdictional Statement at 4-5.

3. N.Y. Civ. Prac. Law § 5602(a)(1(i) and (b)(2)(i) (McKinney 1978) provides:

> (a) Permission of appellate division or court of appeals. An Appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon direct application:
>
> 1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right . . .
>
> (b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:
>
> 2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.
>
> (i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, . . .

Counter Statement of the Case

Appellants' Statement of the Case is at 6-14 of the Jurisdictional Statement.

Appellees wrongly imply (Motion to Dismiss at 3) that Morris was assigned to a shift job despite available non-shift work elsewhere. The record does not show this. The record does show that the circumstances under which Morris was hired were satisfactory to her, and that for nine

years thereafter she never requested a transfer to another area not involving work on a revolving shift. The record further shows, and appellee Morris admits, that for that nine year period there were "no problems" regarding her Sabbath observance.

ARGUMENT

I

The Appeal Is Within The Court's Jurisdiction.

Appellees wrongly assert that this Court lacks jurisdiction because appellants could have obtained a decision from New York's highest Court by appealing "as of right" to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5601(b)(1). Appellants examined this question in the course of the proceeding below and learned, as set forth in 7 Weinstein, Korn & Miller, New York Civil Practice (1981), ¶ 5601.9, that:

> A prime source of difficulty in applying the language of paragraph 1 of CPLR 5601(b) has been in determining whether a constitutional question is "directly" involved. The Court has read the term "directly" to mean that the question must be necessarily" involved in the Appellate Division's decision.

The Court of Appeals, in *Matter of Haydon* v. *Carroll*, 225 N.Y. 84 (1918) stated (p. 88):

> The appellant who relies upon [§ 5601(b)(1)] for his appeal assumes that burden of presenting to us a record which establishes that such construction (of the Constitution of the State or of the United States) has been not only directly but necessarily

> involved in the decision of the case. *If the decision was or may have been based upon some other ground, the appeal will not be.* (Emphasis supplied)

Weinstein, Korn & Miller, *supra,* further states that (pp. 56-25—56-26):

> [T]he problem is present whenever the Appellate Division's decision could have been reached on some ground, such as statutory construction, that would not require resolution of the constitutional question. If resolution of both the constitutional and the non-constitutional question was essential to the Appellate Division's decision, then the constitutional question was "directly" and "necessarily" involved and appeal will lie of right even though the record does not disclose the Appellate Division's reasoning. *When, on the other hand, the decision could rest independently on either ground, the appeal does not lie unless it appears from the record that the Appellate Division rested its decision only on the constitutional ground. If the record is silent, or if it discloses that the Appellate Division rested its decision on the non-constitutional ground or on both grounds, the appeal will not lie; . . .* (Emphasis supplied; citations omitted)

The Appellate Division, Second Department in deciding the instant matter* rested its decision on non-constitutional grounds. In fact no reference to constitutional grounds are found in the Court's decision other than the statement that it "considered petitioners' remaining contentions and find them to be without merit." Hence, an appeal as of right to the Court of Appeals was unavailable to appellants.

---

* Jurisdictional Statement 6a-7a.

Accordingly, because appellants had no appeal as of right, they instead sought permission, of both the Appellate Division and the Court of Appeals, to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5602(a)(1)(i) and (b)(2)(i). Such permission was denied.* Neither decision indicates that permission to appeal was denied because the case was appealable as of right. (See for example, *Unger* v. *Village of Falconer*, 2 N.Y.2d 731 (1956) and *Augstein* v. *Levey*, 2 N.Y.2d 902 (1957) (where motions seeking permission to appeal to the Court of Appeals were denied on the ground that appeals were available as of right).

Therefore, Appellants have exhausted the New York State remedies available to them in accordance with 28 U.S.C. § 1257(2) and the instant appeal may properly be heard by this Court.

II

The Appeal Presents Substantial Federal Questions.

In the second argument of their Motion, appellees rely on *Rankins* v. *Commission on Professional Competence*, 24 Cal.3d 167 (1979), *appeal dismissed*, 444 U.S. 986 (1979) to contend that New York Human Rights Law Section 296.10 on its face raises no substantial Establishment Clause question. This reliance is misplaced because that case could have been decided on grounds independent either of a Free Exercise Clause or Establishment Clause inquiry.

The *Rankins* court construed the California State Constitution to require reasonable accommodation of religious beliefs to the extent presented under the circumstances of

---

* Jurisdictional Statement at 2a and 1a.

that case. The reasonable accommodation duty is otherwise undefined. There, a teacher (Thomas Byars) could have been accommodated without burden or cost because he did not work a revolving shift, substitute teachers were available at no additional cost, a separate statute required that he be given leave, and other teachers were permitted the absences denied him.

Thus, the California Supreme Court reasoned, on those facts a reasonable accommodation requirement was implicit in the State constitutional provision under examination which to that extent did not violate the First Amendment's Establishment Clause.

Moreover, the sincerity of Byars' religious beliefs was not at issue. *Id.* at 167. Therefore, this Court's denial of the appeal in *Rankins* does not automatically dispose of an Establishment Clause question such as presented here, and *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, —— U.S. ——, 70 L.Ed.2d 488 (1981) did not so hold.

A constitutional issue arises if the court is required to determine whether the beliefs allegedly disregarded by the employer were religious. See *Gavin* v. *Poples Natural Gas Company*, 464 F. Supp. 622, *rev'd* 613 F.2d 482, 484-485 (3rd Cir. 1980). The New York Statute in question on its face requires such an inquiry.

Appellees next argue that Section 296.10 as applied to appellants does not transgress the First Amendment because Morris allegedly could have been accommodated without "substantial" costs (Motion to Dismiss at 6-7). Appellees base this contention on the premise that appellant Hospital had "nine years notice of Morris's Sabbath requirement during which it could have assigned her to the clinic to safeguard her Sabbath observance."

First, the record shows that not only was the legitimacy of appellee Morris' purported Sabbath requirement not free from doubt (Jurisdictional Statement 12-13) but also that the nine years went by without a problem as to her Sabbath observance (Jurisdictional Statement at 7). An accommodation duty cannot arise in a vacuum, as appellees' 20-20 hindsight process wrongly presupposes. Appellant had no reason to transfer appellee Morris during the nine years because there was no evident problem before it to resolve. Hence, once the problem did arise, there was a far greater barrier to accommodation than an exemption from a simple work rule, because no openings existed into which appellee Morris could be transferred.

Finally, appellees argue that the statute's "plain meaning" coupled with its legislative history gives employers ample notice of their duties under it. Appellees mistakenly contend that because of *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Schweizer Aircraft Corp.* v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979), anyone should know that the Sabbath observance of a Seventh Day Adventist requires abstention from work from sundown on Friday to sundown Saturday (Motion to dismiss at 7-8). However, since the employers in those cases were not hospitals, it was not revealed that the requirement to abstain from work does not apply to health care institutions (Jurisdictional Statement at 13).

Appellees further urge (Motion to Dismiss at 9) that the Bill Introducers and Governor Rockefeller sufficiently clarified the term "indispensable" as used in Section 296.10 (b). However, the Memorandum of Bill Introducers, 1967 N.Y. Sess. Laws 1486 (McKinney) states that "[T]his exclusion is intended to cover sports coaches or other specialized activities where the job cannot be performed by another person." No clue is provided as to why sports coaches

should be any more indispensable than anyone else, thus deepening the mystery of this statute.

Appellees then, in discussing the "health or safety" exception to the statute, section 296.10(c), quote only Governor Rockefeller's Memorandum of Approval (Motion to Dismiss at 10) which tracks the Memorandum of Bill Introducers (*supra* at 1487) with the significant omission of the all-inclusive "etcetera" found in the Memorandum of Bill Introducers. There, the exception was described as including "police and firemen, *etc.* . . . Appellants contend that the exception reasonably could include health care workers such as appellee Morris, increasing the statute's ambiguity. Since " 'men of common intelligence must necessarily guess its meaning,' " this statute must be struck down. *See Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) (quoting *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926).

Finally, appellees wrongly assert that appellants "made no effort" to accommodate appellee Morris, and therefore cannot claim denial of due process (Motion to Dismiss at 10). This misstates the record, which shows that when appellants learned of Morris' difficulty, they tried to find a solution short of bumping another employee from a job (Jurisdictional Statement at 11-12).

CONCLUSION

For these reasons, appellees motion to dismiss should be denied and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

PETER D. STERGIOS

SHEA & GOULD
Counsel for Appellants
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Dated: New York, New York
October 29, 1982